No. _____

In The

Supreme Court of the United States

ERIC CLEMMONS,

Petitioner,

v.

ESTATE OF GEORGE BROOKS,
and ALONZO GROSS
and WILLIAM ARMONTROUT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Eighth Circuit held that George Brooks, an investigator who concealed exculpatory evidence in a capital murder case, was entitled to qualified immunity. It did so because the court concluded that the absolute duty to disclose exculpatory evidence had never been extended to law enforcement officials other than prosecutors. Does the Eighth Circuit's holding conflict with Supreme Court precedent, including *Youngblood v. West Virginia*, 126 S. Ct. 2188 (2006), which establishes that *Brady* suppression occurs when the government fails to disclose evidence known only to police investigators and not to the prosecutor?

2. In holding that Mr. Brooks was entitled to qualified immunity, the Eighth Circuit found, as a matter of law, that Mr. Brooks did not act recklessly or intentionally to violate Mr. Clemmons's right to a fair trial. Does the Eighth Circuit's holding constitute a departure from its usual course of judicial proceedings such that this Court should review the Eighth Circuit's decision?

3. The Eighth Circuit held, as a matter of law, that Alonzo Gross and William Armontrout did not have sufficient personal involvement in the violation of Mr. Clemmons's rights to support § 1983 claims against them. Does the Eighth Circuit's holding conflict with Second Circuit case law, which states that a defendant's personal involvement in the violation of a constitutionally protected right is a question of fact to be decided by a jury?

PARTIES

Eric Clemmons is the Petitioner. Respondents are the Estate of George Brooks,[1] Alonzo Gross, and William Armontrout. At the time of the events at issue in this case, Mr. Clemmons was an inmate at the Missouri State Penitentiary, Mr. Brooks was an investigator at the Missouri State Penitentiary, Mr. Gross was a corrections officer at the Missouri State Penitentiary, and Mr. Armontrout was the warden of the Missouri State Penitentiary.

[1] Mr. Brooks took his own life while this case was pending before the district court. The district court substituted the Estate of George Brooks as a defendant. In this petition, the Estate of George Brooks is referred to as "Mr. Brooks."

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OPINIONS BELOW

The February 12, 2007 decision of the United States Court of Appeals for the Eighth Circuit is reported at 477 F.3d 962 (8th Cir. 2007) and is reproduced in the petition appendix. Appendix App. 1. The March 19, 2007 order denying Mr. Clemmons's petition for rehearing is not reported, but it is reproduced in the petition appendix. Appendix App. 33. The November 17, 2005 District Court order regarding Mr. Brooks's motion for summary judgment is not reported, but it is reproduced in the petition appendix. Appendix App. 11. The September 15, 2005 District Court order regarding Mr. Gross's and Mr. Armontrout's motion for summary judgment is not reported, but it is reproduced in the petition appendix. Appendix App. 24.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit issued its decision in this case on February 12, 2007, and denied a timely petition for rehearing on March 19, 2007. This petition has been filed within ninety days of the latter date, as required by Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV.

The United States Code provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

42 U.S.C. § 1983.

STATEMENT

I. FACTUAL STATEMENT

This appeal arises out of Eric Clemmons's wrongful conviction for a murder that occurred at the Missouri State Penitentiary in 1985. After he served over a decade on Missouri's death row, Mr. Clemmons's conviction was overturned when a jury was presented with evidence of his innocence that had been knowingly withheld by Mr. Brooks, Mr. Gross, and Mr. Armontrout during Mr. Clemmons's initial trial.

At the time of the murder in question, Mr. Clemmons was an inmate at the Missouri State Penitentiary. The respondents to this appeal were all Missouri state employees who were involved in investigating the murder and reporting it to the prosecuting attorney.

On August 7, 1985, the murder victim, Henry Johnson, was stabbed on the grounds of the Missouri State Penitentiary. Mr. Gross initiated an investigation into the stabbing within minutes after it occurred, directed the search for the murder weapon, and arrested Mr. Clemmons.

During his investigation, Mr. Gross received at least two accounts of the murder. One account was from a Department of Corrections employee, Thomas Steigerwald, who claimed to have seen Mr. Clemmons commit the murder from approximately 80 yards away.[2] The other

[2] Mr. Steigerwald testified at Mr. Clemmons's criminal retrial in 2000 that it was dark out, that he was approximately 80 yards away from the site of the attack, and that there were inmates who were in much closer proximity to the incident.

account was from an inmate named Dwight Clark, who informed Mr. Gross that he had seen two other inmates, one of whom was Fred Bagby, stab Mr. Johnson. On the night of the murder, Mr. Gross detailed Mr. Clark's account in an inter-office communication ("IOC").

Mr. Gross took action in response to Mr. Steigerwald's account, directing two other officers to interview and search several inmates' cells based upon Mr. Steigerwald's version of the events. Mr. Gross, however, chose not to take action in response to Dwight Clark's account of the events, refusing to conduct any meaningful investigation into the possibility that Fred Bagby could have been the attacker. Mr. Gross also discouraged others from interviewing Fred Bagby by documenting that "further investigation" had revealed that Mr. Clark's account did not make sense. Later, Mr. Gross testified against Mr. Clemmons at his murder trial and never mentioned Dwight Clark's account. And, the defense was not able to cross-examine him about the other suspect because the defense was unaware of Mr. Gross's IOC.

Mr. Brooks was the lead investigator at the Missouri State Penitentiary and ultimately became responsible for the murder investigation. He received the IOC from Mr. Gross, yet Mr. Brooks chose not to interview Dwight Clark, the eyewitness identified in Mr. Gross's IOC. He also chose not to interview or investigate Fred Bagby, the alleged murderer. Additionally, he chose not to identify or interview other eyewitnesses or pursue important leads. Furthermore, Mr. Brooks was responsible for compiling the investigation packet for the Cole County Prosecutor, and he omitted clearly exculpatory evidence, including Mr. Gross's IOC, from the investigation packet.

Mr. Armontrout was copied on the IOC from Mr. Gross to Mr. Brooks containing the eyewitness account of the murder. He was also personally informed of the true identity of the murderer by another inmate, James Mayes. According to Mr. Mayes's affidavit, he told Mr. Armontrout that Eric Clemmons had been wrongly incarcerated for the murder.

Mr. Armontrout chose not to take action to make sure Dwight Clark, the eyewitness to Henry Johnson's murder, was properly interviewed. Mr. Armontrout also chose not to take action to ensure that Fred Bagby, the alleged killer, was interviewed or searched. Additionally, Mr. Armontrout chose not to ensure that other potential eyewitnesses or individuals with knowledge of the murder were interviewed.

Furthermore, Mr. Armontrout has admitted that a copy of Mr. Gross's IOC should have been included in the packet of information provided to the prosecuting attorney. Mr. Armontrout has also admitted that he was responsible for ensuring that the packet was complete. Yet, Mr. Armontrout did not include a copy of Mr. Gross's IOC in the packet, nor did he include any mention of Mr. Mayes's statement.

II. PROCEDURAL HISTORY

A. A Jury Overturned Mr. Clemmons's Conviction Based Upon Evidence Suppressed By The Respondents

Based on the deficient information packet prepared by the Defendants, the Cole County, Missouri, Prosecutor charged Mr. Clemmons with murdering Henry Johnson. Eric Clemmons was convicted of Johnson's murder in 1987

and was sentenced to death. After serving over a decade on death row, Mr. Clemmons discovered a copy of the IOC containing the eyewitness account of Henry Johnson's murder.

In 1997, the Eighth Circuit granted Mr. Clemmons's writ of habeas corpus, vacating his conviction based upon the newly discovered evidence. *See Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997). The Eighth Circuit reviewed the very facts at issue in the present case and unequivocally found that Mr. Clemmons had stated a constitutional violation based upon the failure to disclose exculpatory evidence (the IOC) regarding statements made by Mr. Clark. *See id.* at 944. Specifically, the court held that, "[w]hether framed as an ineffective assistance of counsel claim or as a *Brady* claim, Clemmons's claim undeniably state[d] a constitutional violation." *Id.* at 949.

On February 18, 2000, a jury considered the previously suppressed evidence and acquitted Mr. Clemmons of the murder. Approximately one year later, the Missouri Department of Corrections acknowledged that Mr. Clemmons was not responsible for Henry Johnson's death and expunged his prison record of the murder.

B. Mr. Clemmons's Civil Rights Action

In February 2003, Mr. Clemmons filed a civil rights action against Mr. Gross, Mr. Brooks, Mr. Armontrout, and several other defendants pursuant to 42 U.S.C. § 1983 and Missouri state law. In September 2005, the Honorable Scott O. Wright, United States District Judge, granted a motion for summary judgment in favor of several of the defendants, including Mr. Gross and Mr. Armontrout. The court found that, as a matter of law, Mr. Gross and Mr.

Armontrout did not have sufficient "personal involvement" in the deprivation of Mr. Clemmons's rights. The court reasoned that they were not "directly involved" in the investigation, and that "[h]ad they received information concerning the case, they would merely have forwarded it to the investigating officer, Brooks, whose report would then have been forwarded to the prosecuting attorney." September 15, 2005 Order, Appendix App. 29.

In November 2005, the court ruled on a separate motion for summary judgment, which was filed by Mr. Brooks. It granted the motion with respect to Mr. Clemmons's state law claims but denied the motion with respect to Mr. Clemmons's constitutional claims, holding that Mr. Brooks was not entitled to qualified immunity. The court specifically held that a reasonable jury could "determine that defendant Brooks's failure to investigate the exculpatory information set forth in the IOC, and his failure to forward the IOC to the prosecutor's office as part of the murder investigation file, was the result of reckless or deliberate intent and not that of mere negligence." November 17, 2005 Order, Appendix App. 20.

On appeal, the Eighth Circuit affirmed the district court's entry of summary judgment in favor of Mr. Gross and Mr. Armontrout and reversed the district court's denial of summary judgment as to Mr. Brooks. With respect to Mr. Brooks, the court reasoned that the absolute duty to produce materially unfavorable evidence to the defense, which is imposed under the *Brady* doctrine, had never been extended to law-enforcement officials other than prosecutors. February 12, 2007 Opinion, Appendix App. 6-7. On this basis, the court held, as a matter of law, that Mr. Brooks's actions were not intentional or reckless and, therefore, Mr. Brooks was entitled to qualified immunity

with regard to Mr. Clemmons's § 1983 claims against him. Appendix App. 8-9.

The Eighth Circuit held that Mr. Gross and Mr. Armontrout had only "minimal personal involvement in the investigation." *Id.* at 9. On this basis, the court determined that a reasonable jury could not return a verdict in Mr. Clemmons's favor and affirmed the district court's entry of summary judgment. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION REGARDING MR. CLEMMONS'S CLAIMS AGAINST MR. BROOKS CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT

A. *Youngblood v. West Virginia*

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that "suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In the instant case, the Eighth Circuit relied on *Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004), to support its conclusion that the absolute duty to produce all materially unfavorable evidence in the state's possession had never been extended to law-enforcement officials other than prosecutors. Appendix App. 6-7. This conclusion, however, is in direct conflict with Supreme Court authority.

In *Youngblood v. West Virginia*, 126 S. Ct. 2188 (2006),[3] this Court explained that "[a] *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood*, 126 S. Ct. at 2190. Evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (quoting *Strickler v. Greene*, 527 U.S. 263, 280 (1999)).[4]

In *Youngblood*, a state trooper found a note containing exculpatory evidence. The trooper allegedly read the note but declined to take possession of it or turn it over to the prosecuting attorney. The trial court expressed the view that the investigating trooper had attached no importance to the note. This Court, however, did not agree that the investigator's alleged failure to recognize the significance of the evidence barred the plaintiff from making a valid *Brady* claim. *Youngblood* at 2190. The Court found that the officer's state of mind was unimportant, holding that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Id.* (quoting

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[3] The Supreme Court issued its opinion in *Youngblood v. West Virginia* after appellate briefing in the instant case was complete. Therefore, Mr. Clemmons did not cite this case in his briefs. Mr. Clemmons did, however, cite to other well-established authority for the proposition that the *Brady* doctrine had been extended to police officers. Mr. Clemmons's counsel also argued that *Brady* had been extended to police officers and corrections officials during oral argument before the Eighth Circuit panel.

[4] In the instant case, there can be no dispute regarding the materiality of the evidence at issue. When Mr. Clemmons was retried for Henry Johnson's murder, and the jury was presented with the previously suppressed evidence, the jury acquitted him.

Kyles v. Whitely, 514 U.S. 419, 438 (1995)). The Court's ruling in *Youngblood* makes clear that the absolute duty to disclose exculpatory evidence is not limited to prosecutors. Therefore, the Eighth Circuit's conclusion that the *Brady* doctrine has never been extended to "law enforcement officials other than prosecutors" is in direct conflict with *Youngblood,* and this Court should grant a writ of certiorari to ensure that the conflict is resolved.

B. *Monroe v. Blackburn*

Youngblood was not the first case in which the Supreme Court extended the *Brady* doctrine beyond prosecutors. *Youngblood* simply solidified the Court's position on this issue. In 1986, when Justice Marshall issued his dissenting opinion in *Monroe v. Blackburn*, 476 U.S. 1145 (1986), he stated:

> If by now police are not fully aware of their constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel, this Court should seize this case as a chance to educate them.

Id. at 1149. Justice Marshall further stated, "I cannot believe that either an examination of the record or a law degree is needed to appreciate that admissions by a wife-killer incriminating himself in the murder of a former wife cannot be dismissed as idle gossip." *Id.*

As Justice Marshall noted in *Monroe*, the Supreme Court has recognized that when a government employee becomes aware of clearly exculpatory evidence, a constitutional obligation to disclose the evidence to the prosecution and the defense exists. The Eighth Circuit's conclusion

that *Brady* has never been extended to "law enforcement officials other than prosecutors" is in direct conflict with this authority. Therefore, this Court should grant a writ of certiorari in order to resolve the conflict.

II. THE EIGHTH CIRCUIT'S DECISION REGARDING MR. CLEMMONS'S CLAIMS AGAINST MR. BROOKS REPRESENTS A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS

Not only is the Eighth Circuit's decision in this case inconsistent with Supreme Court precedent, but it also departs from the Eighth Circuit's usual course of judicial proceedings to such a degree that this Court should exercise its supervisory powers to rectify the resulting injustice.

Even before *Youngblood*, the Eighth Circuit had recognized that the *Brady* doctrine was applicable to law-enforcement officials. In *Wilson v. Lawrence County, Mo.*, 260 F.3d 946 (8th Cir. 2001), the Eighth Circuit held that "law enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly as illustrated by the *Brady* line of cases requiring the state to disclose exculpatory evidence to the defense." *Id.* at 957. The Court further held that when prison officials have time to make unhurried judgments, such as during post-arrest investigations, and they fail to investigate leads or provide exculpatory evidence to prosecuting attorneys, their conduct constitutes recklessness for purposes of establishing a constitutional violation. *See id.* at 956-57.

Henry Johnson was killed in 1985, and Mr. Clemmons was not tried for the murder until 1987. Mr. Brooks, along with the other Defendants, had time to make unhurried judgments during the post-arrest investigation of Henry Johnson's murder. Defendants were presented with two accounts of the murder – the account of Mr. Steigerwald, who was 80 yards away from the attack and admitted it was dark at the time, and the account of Mr. Clark, who was much closer and better able to see the attack. They acted on Mr. Steigerwald's version of the events, arresting and interviewing the individuals whom Mr. Steigerwald claimed were involved. Mr. Brooks and the other Defendants were aware of Dwight Clark's eyewitness account of the murder and chose not to act upon it. They affirmatively chose not to conduct a thorough or proper investigation. The evidence in this case also demonstrates that Mr. Brooks chose not to take the simple and obvious steps of interviewing Dwight Clark and the alleged attacker, Fred Bagby. Mr. Clemmons also established that Mr. Brooks and the other Defendants concealed Dwight Clark's eyewitness account of the murder from the prosecuting attorney.

Defendants essentially acted as judge and jury when they ignored and suppressed evidence that, when later discovered, was used to exonerate Mr. Clemmons. Applying the Eighth Circuit's analysis in *Wilson*, their actions can only be attributed to a deliberate and reckless indifference to Mr. Clemmons's constitutionally protected rights.

Mr. Brooks and the other Defendants knew that Mr. Clemmons's life was on the line. In such grave circumstances, there is no explanation, much less a countervailing government interest that would excuse them from

their duty to investigate leads and provide materially exculpatory evidence to the prosecutor. *See id.* at 957. This is especially true when the court is required to view the facts "in the light most favorable to the injured party." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

As the district court recognized, a reasonable jury could certainly determine based upon the evidence presented by Mr. Clemmons that Mr. Brooks acted recklessly or intentionally. The Eighth Circuit, however, strayed from established authority, usurped the jury's role, improperly took the facts in the light most favorable to Defendants, and found that, as a matter of law, Mr. Brooks's actions were not intentional or reckless. February 12, 2007 Opinion, Appendix App. 7-8. Because the Eighth Circuit's decision constitutes a drastic departure from its usual course of proceedings, this Court should exercise its supervisory powers to ensure that the unjust result does not stand.

III. THE EIGHTH CIRCUIT'S DECISION WITH REGARD TO MR. CLEMMONS'S CLAIMS AGAINST MR. GROSS AND MR. ARMONTROUT CREATES A CONFLICT BETWEEN CIRCUITS

The Second Circuit has specifically held that personal involvement of defendants in actions alleging § 1983 violations is a question of fact. *See Williams v. Smith*, 781 F.2d 319, 323-324 (2d Cir. 1986). Therefore, it employs the general rule that "summary judgment may be granted only if no issues of material fact exist and the defendant is entitled to judgment as a matter of law." *Id.* at 323. In the Second Circuit, the party seeking summary judgment bears the burden of establishing that no such dispute exists. *Id.* (citing *Gutwein v. Roche Laboratories*, 739 F.2d

93, 95 (2d Cir. 1984)). And, "[a]ll ambiguities must be resolved and all inferences drawn in favor of the party against whom judgment is sought." *Id.* (quoting *Patrick v. Le Fevere*, 745 F.2d 153, 158 (2d Cir. 1984)). Furthermore, the Second Circuit has held that if "the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." *Id.* (quoting *Patrick*, 745 F.2d at 160).

In *Williams v. Smith*, the Second Circuit set forth several ways in which a defendant may be personally involved in a constitutional violation within the meaning of § 1983. Included are direct participation in the alleged infraction and, for supervisory officials, failure to remedy a wrong after learning of a violation. *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033-34 (2d Cir. 1973); *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971); *United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975)).

The Eighth Circuit's analysis in the present matter conflicts with the Second Circuit's approach in at least three ways: (1) the Eighth Circuit does not recognize that an official's personal involvement in an alleged § 1983 violation is a question of fact that should be addressed by the jury; (2) despite holding that Mr. Clemmons has presented evidence that both Mr. Gross and Mr. Armontrout were personally involved in the faulty investigation that lead to the violation of Mr. Clemmons's rights, the court grants summary judgment to Defendants because it subjectively determines that their involvement was "minimal"; and (3) the Eighth Circuit does not recognize the possibility that Defendants may have violated Mr.

Clemmons's rights by failing to remedy a wrong after learning of a constitutional violation.

A. Mr. Gross's Personal Involvement

The Eighth Circuit's opinion states, "Captain Gross's investigation of Johnson's murder was brief," and "[o]nce Investigator Brooks took over the investigation, Captain Gross had nothing further to do with it." February 12, 2007 Opinion, Appendix App. 9-10. Mr. Clemmons respectfully suggests that this conclusion misses the point. Mr. Gross initiated the murder investigation and was directly involved in it. The length or degree of his involvement is not significant. What is significant is that he obtained materially exculpatory evidence, chose not to follow up on the evidence, discouraged others from following up on the evidence, and did not provide the evidence to the prosecuting attorney, which he was required to do under the *Brady* doctrine. Additionally, Mr. Gross was a "major witness for the State" in Mr. Clemmons's first murder trial, (*Clemmons v. Delo*, 124 F.3d at 951), and he never even mentioned Dwight Clark's account of the murder. It could certainly be said, using the Second Circuit's approach, that Mr. Gross failed to remedy a wrong after learning of a constitutional violation. Furthermore, a jury could certainly determine that, as a direct result of Mr. Gross's actions, Mr. Clemmons was convicted of a crime he did not commit. Using the thoughtful analysis established by the Second Circuit, a court would have no choice but to conclude that these facts were sufficient to defeat a motion for summary judgment.

B. Mr. Armontrout's Personal Involvement

The Eighth Circuit's opinion states, "Clemmons has produced no evidence indicating that Warden Armontrout was ever directly involved in the investigation of Johnson's Murder." February 12, 2007 Opinion, Appendix App. 10. Contrary to this statement, Mr. Clemmons presented substantial evidence of Mr. Armontrout's personal involvement in the deprivation of his constitutionally protected rights.

Mr. Armontrout was responsible for ensuring that Henry Johnson's murder was properly investigated and chose not to take action to make sure Dwight Clark, the eyewitness to Henry Johnson's murder and Fred Bagby, the alleged killer, were properly interviewed. Furthermore, even if Mr. Armontrout was not "directly involved" in the investigation, he was aware of materially exculpatory evidence and chose to withhold it in violation of his *Brady* obligation. Eric Clemmons presented evidence that Mr. Armontrout was personally informed of the true identity of the murderer by an inmate named James Mayes. According to Mr. Mayes's affidavit, he told Mr. Armontrout that Eric Clemmons was wrongly incarcerated for Henry Johnson's murder. Using the Second Circuit's analysis, this evidence of Mr. Armontrout's failure to remedy a wrong after learning of a constitutional violation would be sufficient to defeat a summary judgment motion. *See Williams v. Smith*, 781 F.2d at 323 (citing *United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975)).

Furthermore, Mr. Armontrout testified that he was responsible for ensuring that the investigation packet for the Cole County Prosecutor was complete, and there is no

question that the packet he sent did not contain any information about Dwight Clark's eyewitness account or James Mayes's statement. Taken in the light most favorable to Mr. Clemmons, this evidence alone would establish personal involvement under the Second Circuit's analysis. The Eighth Circuit, however, while recognizing that Mr. Armontrout was personally involved in the actions that resulted in the alleged violation of Mr. Clemmons's rights, upheld the district court's entry of summary judgment because it determined that his involvement was "minimal." *See* February 12, 2007 Opinion, Appendix App. 10.

C. The Eighth Circuit's Analysis And Ultimate Decision Are In Direct Conflict With Decisions Of Another Circuit And The Conflict Should Be Remedied

The Eighth Circuit's determination that, as a matter of law, Mr. Gross and Mr. Armontrout were not sufficiently personally involved in violating Mr. Clemmons's rights to support valid § 1983 claims is inappropriate. The court's analysis and conclusions create a direct conflict with another federal circuit's approach, which, if applied in this case, would dictate that a jury should assess the facts presented by Mr. Clemmons and determine whether these Defendants violated his constitutionally protected rights.

CONCLUSION

Mr. Brooks, Mr. Gross, and Mr. Armontrout chose to ignore leads in the investigation of Henry Johnson's murder. They also knowingly concealed material evidence in a capital murder case. As a result, Mr. Clemmons spent over a decade on death row and nearly paid the ultimate price for a crime he did not commit. For these reasons, and for all of the reasons set forth above, Mr. Clemmons respectfully requests that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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477 F.3d 962

United States Court of Appeals,
Eighth Circuit.
Eric CLEMMONS, Appellee/Cross-Appellant,
v.
William ARMONTROUT, Warden; George Brooks; Alonzo Gross; Arthur Dearixon; Thomas Steigerwald; Donald Cline; Larry Henson, Deputy Warden; Bill Rutledge; Robert Acree; James Eberle; Cross-Appellees, Estate of George Brooks, Appellant/Cross-Appellee.
Nos. 05-4140, 06-1099.

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Matthew Barton Briesacher, argued, Attorney General's Office, Jefferson City, MO, for appellant.

Erick J. Roeder, argued, Kansas City, MO, (Kamran Q. Khan, on the brief), for appellee.

Before RILEY, HANSEN, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Eric Clemmons, an inmate incarcerated at the Missouri State Penitentiary ("MSP"), sued MSP Investigator George Brooks, now deceased, Warden William Armontrout, and Corrections Supervisor Alonzo Gross (collectively referred to as "appellants") under 42 U.S.C. § 1983. Clemmons alleged that appellants' intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information deprived Clemmons of his liberty interest in a fair trial. Clemmons contends that their acts caused him to be wrongfully convicted for murder and placed on death row for 14 years. The district court granted summary judgment to Warden Armontrout and Captain Gross, concluding that neither of them was

personally involved in the alleged deprivation of Clemmons's constitutional rights, but denied Investigator Brooks qualified immunity. We reverse the district court's denial of qualified immunity to Investigator Brooks and affirm the district court's grant of summary judgment to Warden Armontrout and Captain Gross.

I. *Background*

Clemmons is an inmate in the custody of the Missouri Department of Corrections.[1] While Clemmons was incarcerated at the MSP, someone stabbed fellow inmate Henry Johnson three times, leading to his death. When the assault occurred, Corrections Officer Thomas Steigerwald called for assistance, and Captain Gross responded to the call. Officer Steigerwald claimed to have witnessed the stabbing and identified Clemmons as the perpetrator. Officer Steigerwald and Captain Gross took Clemmons into custody. The officers noticed bloodstains on Clemmons's sweatshirt and tennis shoes.

After taking Clemmons into custody, Captain Gross returned to the scene of the stabbing and ordered corrections officers to search for the assailant's weapon. No weapon, however, was ever located. Thereafter, Captain Gross supervised a preliminary investigation into Johnson's stabbing until the MSP investigator arrived to conduct an investigation. In the meantime, inmate Dwight Clark approached Captain Gross and told him that he had witnessed two men assaulting Johnson. He described both assailants as being black, stated his belief that one of the

[1] In 1983, Clemmons was convicted of capital murder and assault and sentenced to life without the possibility of parole for 50 years.

inmates was Fred Bagby, and explained that he only knew the second inmate by sight.

Captain Gross never interviewed Fred Bagby or searched his cell; however, he did review the out-count list and concluded that because Bagby was not on the out-count list,[2] Clark's statement was not credible. He admitted, however, that there would have been more than one out-count list, meaning that Bagby could have been listed on another out-count list that he did not check. Additionally, he conceded that an inmate could be in the prison yard without being listed on the out-count list.

After receiving and investigating Clark's statement, Captain Gross prepared an Inter-Office Communication ("IOC") memorandum to Investigator Brooks – the MSP investigator assigned to the murder investigation –which outlined Captain Gross's investigation and his conversation with Clark. In the IOC, Captain Gross noted his misgivings about Clark's statement, concluding that "[w]hen questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue." Warden Armontrout, Deputy Warden Donald Cline, Superintendent Robert Acree, and Major James Eberle were forwarded a copy of the IOC.

Investigator Brooks never interviewed Clark or Bagby as part of his investigation. After he completed his investigation, he forwarded his investigation file to Warden Armontrout, who then forwarded the file to the Cole County Prosecuting Attorney's Office for review. The file

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[2] The "out-count" list sets forth the names of inmates who have permission to be out of their cells. *Douglas v. Clark*, 993 F.2d 1549, 1993 WL 137718, at (7th Cir. Apr.30, 1993) (unpublished).

forwarded to the prosecuting attorney did not contain the IOC detailing Clark's statements. The prosecuting attorney charged Clemmons with the murder of Johnson. Clemmons was subsequently convicted of the murder in 1987 and sentenced to death. Clemmons exhausted his state appeals.

In 1997, Clemmons filed a writ of habeas corpus, alleging that exculpatory evidence – the IOC – "was withheld from him prior to his trial in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *Clemmons v. Delo,* 124 F.3d 944, 947 (8th Cir.1997). We granted Clemmons the writ, concluding that "[w]hether framed as an ineffective assistance of counsel claim or as a *Brady* claim, Clemmons's claim undeniably states a constitutional violation." *Id.* at 949. "We [could not] say with confidence that the jury would have reached the same verdict when presented with an eyewitness [Clark] who accused a different inmate [Bagby] of the crime within an hour of the murder, the very same inmate that three other witnesses had also accused of the crime."[3] *Id.* at 951.

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[3] At trial, Clemmons presented the testimony of three fellow inmates who identified Bagby as Johnson's killer; however, in each case, the witness had not come forward until Bagby had died. The prosecution impeached the testimony of Clemmons's witnesses by asserting that Bagby was conveniently dead at the time that they came forward. Without knowledge of the IOC, Clemmons was unable to rehabilitate his witnesses. At the time Clark accused Bagby of Johnson's murder, Bagby was alive; therefore, Clark identifying Bagby as the killer an hour after the murder would have supported the three inmates' testimony. In addition, Clemmons could have called Clark as a witness. *Clemmons,* 124 F.3d at 950-51.

The State of Missouri then retried Clemmons, and, on February 18, 2000, a jury acquitted him of the murder of Johnson. Approximately three years later, Clemmons filed the instant lawsuit under 42 U.S.C. § 1983, alleging that he was deprived of his liberty interest in a fair trial due to appellants' intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information.

II. *Discussion*

The Estate of Investigator Brooks appeals, arguing that the district court erred in denying Investigator Brooks qualified immunity because Clemmons failed to show that Brooks intentionally or recklessly failed to investigate leads or produce exculpatory information in violation of Clemmons's due process rights. Clemmons cross-appeals, asserting that the district court erred in granting summary judgment to Warden Armontrout and Captain Gross because a genuine issue of material fact remains as to their "personal involvement" in the investigation of Johnson's murder.

A. *Qualified Immunity*

We review de novo the district court's denial of qualified immunity to Investigator Brooks. *McClendon v. Story County Sheriff's Office,* 403 F.3d 510, 515 (8th Cir.2005).

To determine whether an official is entitled to qualified immunity, we engage in a two-part analysis. The "threshold question" is whether, taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the official's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "To establish a substantive

due process violation, plaintiffs must show that the behavior of the [official] was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," *Terrell v. Larson,* 396 F.3d 975, 978 (8th Cir.2005) (quotations and citation omitted), and that the conduct "violated one or more fundamental rights." *Moore v. Briggs,* 381 F.3d 771, 773 (8th Cir.2004). If we conclude that the alleged facts do not establish the violation of a constitutional right, then we need not address the second inquiry. *Id.*

"On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. To determine whether a right is "clearly established," we ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

As to the threshold inquiry, the Supreme Court has held that "suppression by the *prosecution* of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (emphasis added). We recognized this constitutional violation in our previous decision granting Clemmons habeas relief for the prosecution's failure to divulge the IOC. *See Clemmons,* 124 F.3d at 949.

We have, however, also recognized that while "[t]he *Brady* doctrine imposes an absolute duty on the prosecutor to produce all materially favorable evidence in the State's possession," the Court "has never imposed this absolute

duty on law enforcement officials other than the prosecutor." *Villasana v. Wilhoit,* 368 F.3d 976, 979 (8th Cir.2004). The "Due Process Clause is simply not implicated by a *negligent act* of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams,* 474 U.S. 327, 328, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (emphasis added) (overruling *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), "to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment"). "[I]t would be impermissible to hold the police liable for due process violations under § 1983 where they have acted in good faith." *Jean v. Collins,* 221 F.3d 656, 660 (4th Cir.2000). "Indeed, negligent conduct cannot by definition establish the 'affirmative abuse of power' necessary to constitute a due process deprivation." *Id.* Therefore, where no evidence exists that the investigator acted in bad faith or "engaged in a conscious effort to suppress exculpatory evidence," the accused's due process rights have not been violated. *Villasana,* 368 F.3d at 980 (internal quotations and citation omitted).

Likewise, "[n]egligent failure to investigate other leads or suspects does not violate due process." *Wilson v. Lawrence County, Mo.,* 260 F.3d 946, 955 (8th Cir.2001) (citing *Daniels,* 474 U.S. at 334, 106 S.Ct. 662). Even allegations of gross negligence fail to establish a constitutional violation. *Id.* "[O]nly *reckless* or *intentional* failure to investigate other leads offends a defendant's due process rights." *Id.* (emphasis added).

We hold that, under the first prong of *Saucier,* Investigator Brooks did not violate Clemmons's constitutional rights, as Clemmons adduced no evidence that Brooks

acted intentionally, recklessly, or in bad faith when he failed to disclose the IOC to the prosecutor and failed to investigate Clark's statement that Bagby murdered Johnson. While Clemmons argues that he demonstrated recklessness by providing evidence that Investigator Brooks received the IOC, failed to interview Clark, failed to interview other eyewitnesses, and failed to include the IOC to the prosecutor, he has offered no explanation for why these actions constitute recklessness as opposed to mere negligence. "[C]onclusory allegations will not suffice." *Jean,* 221 F.3d at 662.

As a matter of law, we conclude that the undisputed facts establish that Investigator Brooks's actions were not intentional or reckless. Mere negligence on Brooks's part by failing to disclose the IOC or investigating another lead is insufficient to deny him qualified immunity. First, Captain Gross stated in the IOC that "Clark's statement was not credible." Brooks may have erroneously relied on Gross's credibility assessment or been less than thorough, but, without more, his actions cannot be deemed "reckless." Investigator Brooks had the eyewitness statement of Officer Steigerwald identifying Clemmons as the perpetrator. Second, as in *Villasana,* Clemmons has produced no evidence that Brooks consciously sought to suppress exculpatory evidence by failing to disclose the IOC to the prosecutor. Third, Clemmons has not alleged that Investigator Brooks unlawfully coerced others to suppress the exculpatory evidence or refrain from investigating other leads. *See Wilson,* 260 F.3d at 955 (agreeing with the district court's conclusion that "[i]f [the plaintiff's] allegations about unlawful coercion are proved true, a reasonable factfinder could determine that Defendants recklessly or intentionally chose to force [the plaintiff] to confess

instead of attempting to solve the murder through reliable but time consuming investigatory techniques designed to confirm their suspicions") (quotations and citation omitted).

Therefore, we hold that Investigator Brooks is entitled to qualified immunity.

B. *Personal Involvement*

As to Clemmons's cross-appeal, we review de novo the district court's grant of summary judgment to Warden Armontrout and Gross. *Freeman v. Ace Tel. Ass'n,* 467 F.3d 695, 697 (8th Cir.2006).

"Liability under section 1983 requires a causal link to, and direct responsibility for, the deprivation of rights. To establish personal liability of the supervisory defendants, [the plaintiff] must allege specific facts of personal involvement in, or direct responsibility for, a deprivation of his constitutional rights." *Mayorga v. Missouri,* 442 F.3d 1128, 1132 (8th Cir.2006) (internal quotations and citations omitted). A plaintiff fails to meet this burden where no evidence is presented that the officials caused the suppression of exculpatory evidence "or that [the officials] participated in the investigation in anything other than a limited manner." *Fleming v. Greater St. Louis Area Major Case Squad,* 48 F.3d 1223, 1995 WL 57457, at (8th Cir. Feb.14, 1995) (unpublished). "[A] warden's general responsibility for supervising the operations of a prison is insufficient to establish personal involvement." *Ouzts v. Cummins,* 825 F.2d 1276, 1277 (8th Cir.1987).

Captain Gross's investigation of Johnson's murder was brief and limited, as he only supervised a preliminary

investigation into the stabbing incident *until* Investigator Brooks arrived to take over the investigation. Once Investigator Brooks took over the investigation, Captain Gross had nothing further to do with it. In addition, the undisputed facts show that Captain Gross forwarded the information that he received from Clark to Investigator Brooks via the IOC.

As to Warden Armontrout, his general supervisory duties are also insufficient to establish his personal involvement in the investigation. Clemmons has produced no evidence indicating that Warden Armontrout was ever directly involved in the investigation of Johnson's murder. Furthermore, although Warden Armontrout did receive a copy of the IOC, it was Investigator Brooks, not Warden Armontrout, who was responsible for putting the packet of investigatory materials together for the prosecutor.

Because the undisputed facts establish that Captain Gross and Warden Armontrout had only minimal personal involvement in the investigation, we hold that a reasonable jury could not return a verdict in Clemmons's favor. Therefore, the district court properly granted summary judgment to Warden Armontrout and Captain Gross.

III. *Conclusion*

Accordingly, we reverse the district court's denial of qualified immunity to Investigator Brooks and affirm the district court's grant of summary judgment to Warden Armontrout and Captain Gross.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ERIC CLEMMONS, Register No. 99956, Plaintiff, v. BILL ARMONTROUT, et al., Defendants.	)	No. 03-4033-CV-C-SOW (Filed Nov. 17, 2005)

ORDER

Plaintiff, an inmate confined in a Missouri penal institution, commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the jurisdictional statute, 28 U.S.C. § 1343.

In support of his claims for relief, plaintiff states he was deprived of his liberty interest in a fair trial due to defendant George Brooks' intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information, which resulted in plaintiff being wrongly convicted for murder and on death row for fourteen years, and plaintiff seeks relief for the physical, emotional, and economic damages related thereto.

On August 9, 2005, defendant Estate of George Brooks filed a motion for summary judgment. Defendant argues that plaintiff can produces [sic] no admissible evidence creating a genuine dispute of material fact as to his claims against defendant and, thus, defendant is entitled to judgment as a matter of law as to plaintiff's 42 U.S.C. § 1983 due process claim and claim of malicious prosecution.

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op.,* 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. *Celotex,* 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." *Hass v. Weiner,* 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan,* 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed. R. Civ. P. 56(c).

Statement of Facts

Plaintiff Eric Clemmons is an inmate in the custody of the Missouri Department of Corrections. Plaintiff was convicted of capital murder and assault in 1983, and was sentenced to life without the possibility of parole for fifty years.

Plaintiff's claims relate to the murder of inmate Henry Johnson on August 7, 1985, at Missouri State Penitentiary (MSP). Johnson was stabbed three times and later died from his injuries. Corrections Officer I Thomas Steigerwald, believed to have witnessed the stabbing, identified plaintiff Clemmons as the offender who stabbed inmate Johnson. At the time of the murder, Steigerwald called for assistance, and Capt. Gross, a corrections supervisor at MSP, responded to the call. Plaintiff was taken into custody by defendants Steigerwald and Gross. When placed in a holding cell after being taken into custody, plaintiff's sweatshirt and tennis shoes were noted as having bloodstains on them. After taking plaintiff into custody, defendant Gross returned to the scene of the stabbing and gave orders for corrections officers to search for the assault weapon. No weapon was ever located. Gross thereafter continued to supervise a cursory investigation into the stabbing incident until an investigator arrived to command the investigation. While conducting such investigation, inmate Dwight Clark advised Gross that he had witnessed two men assaulting Johnson, and described both assailants as being black, and thought one was inmate Fred Bagby, but only knew the second inmate by sight. Gross, subsequently, on that same date, prepared an Inter-Office Communication (IOC) to George Brooks, the MSP investigator assigned to the murder investigation, which outlined Gross' investigation and his conversation

with inmate Clark. The IOC from Gross notified investigator Brooks of Clark's statement, but qualified the information with a statement that "[w]hen questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue." The IOC indicates that defendants William Armontrout, Warden; Donald Cline, Deputy Warden; Robert Acree, Superintendent I; Major James Eberle and specified others were forwarded a copy of the IOC.

Defendant Gross states in his deposition that he did not speak to, or search the cell of, Fred Bagby, but rather, checked the out-count list and determined that because Bagby was not listed, Clark's statement was not credible. Gross further states, however, that there would have been more than one out-count list and, thus, Bagby could have been listed on those separate out-counts, which he did not check, and/or that it is possible an inmate could be in the prison yard without being listed on the out-count.

Investigator George Brooks stated in his deposition that he had no recollection of seeing the IOC from Gross, and that he did not follow up with inmates Clark or Bagby as a part of his investigation. When Brooks completed his investigation into the murder, he forwarded his investigation file to Warden Armontrout, who then forwarded it to the Cole County Prosecuting Attorney's Office for review. The file forwarded to the prosecuting attorney's office did not contain the IOC written by Capt. Gross regarding the statements made by inmate Clark, who claimed to be an eye-witness to Fred Bagby and another inmate stabbing Johnson.

The Cole County Prosecuting Attorney charged plaintiff Clemmons with the murder of inmate Johnson.

Plaintiff was convicted of the murder of inmate Johnson in 1987 and was sentenced to death.

In 1997, the United States Court of Appeals for the Eighth Circuit granted plaintiff's writ of habeas corpus, thereby vacating his conviction. *See Clemmons v. Delo,* 124 F.3d 944 (1997). The Court granted habeas, citing a constitutional violation in the failure to disclose exculpatory evidence (Gross' memorandum (IOC) regarding statements made by inmate Clark), and found that there was a reasonable probability that the verdict of the jury would have been different were it not for the violation of Clemmons' constitutional rights. The court went on to say that "[w]e cannot say with confidence that the jury would have reached the same verdict when presented with an eyewitness who accused a different inmate of the crime within an hour of the murder, the very same inmate that three other witnesses had also accused of the crime." *Id.* at 951. At trial, plaintiff presented three witnesses (fellow inmates) who identified Fred Bagby as the killer, but in each case, the witness had not come forward until Fred Bagby had died. The prosecution impeached the testimony of plaintiff's witnesses by arguing that Bagby was conveniently dead at the time they came forward. Without knowledge of the IOC written by Capt. Gross, plaintiff and his criminal defense counsel were not able to rehabilitate plaintiff's witnesses. At the time Clark had accused Bagby of the murder, Bagby was alive. Thus, Clark identifying Bagby as the killer an hour after the murder would have supported the testimony of plaintiff's three other witnesses. Moreover, Clark could have been called as a witness on Clemmons' behalf.

On February 18, 2000, a jury acquitted plaintiff Clemmons of the murder of inmate Johnson. On February

24, 2001, pursuant to grievances filed by Clemmons with the Department of Corrections, plaintiff's prison records were expunged of the murder of Johnson. Plaintiff filed his claim under 42 U.S.C. § 1983 on February 20, 2003.

Discussion

Statute of Limitations and 42 U.S.C. § 1983 Claims

"[T]he length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Wilson v. Garcia,* 471 U.S. 261, 266-68 (1985). In Missouri the applicable statute of limitations for a section 1983 claim is five years. *Sulik v. Taney* County, 393 F.3d 765, 767 (8th Cir. 2005) (citing *Wilson,* 471 U.S. at 276).

Plaintiff's claims challenging defendant's intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information, resulting in plaintiff being wrongly convicted for murder, were not ripe for challenge until he was acquitted on February 18, 2000, and thus, the applicable five-year statute of limitations did not start to run until such time. Thus, plaintiff's filing of his claims with this court on February 20, 2003, was within the five years as provided by Missouri law and, thus, were timely filed.

Statute of Limitations and State Law Claim of Malicious Prosecution

In Missouri all actions brought by an offender against the department of corrections or any entity or division thereof, or any employee or former employee for an act in their official capacity, or by omission of an official duty

shall be brought within one year, pursuant to V.A.M.S. § 516.145. Pursuant to V.A.M.S. § 516.140, a malicious prosecution tort claim must be brought within two years.

In Missouri, a claim of malicious prosecution accrues when the underlying proceeding is terminated in plaintiff's favor. *Linn v. Moffitt,* 73 S.W.3d 629, 633 (Mo. App. E.D. 2002) (citing *Arana v. Reed,* 793 S.W.2d 224, 226 (Mo. App. 1990)). The termination of a proceeding is effected by a final judgment on the merits, a dismissal, with prejudice, or abandonment of an action. *Id.*

In the instant case, plaintiff's acquittal of the criminal murder charges on February 18, 2000, is the date of termination of the proceedings and, thus, when the statute of limitations began to run as to plaintiff's malicious prosecution claim. *Id.* (date of termination of stealing claims was date plaintiff was acquitted of such charges). In applying either the one-year statute of limitations provided by section 516.145 for claims against defendant in his official capacity; or the two-year statute of limitations for any claims against defendant in his personal capacity; the court finds that plaintiff filed his complaint with this court on February 20, 2003, almost three years after his acquittal date of February 18, 2000, and thus, plaintiff's state law claims are barred by the statute of limitations. The court further notes that Missouri law indicates that the statute of limitations is not tolled pending exhaustion of administrative remedies, but rather, the remedy provided by the legislature allows for an inmate to seek a stay of a timely filed lawsuit, not the tolling of the statute of limitations. *Cooper v. Minor,* 16 S.W.3d 578, 582 (Mo. en banc 2000). The Missouri Supreme Court held in *Cooper* that a stay of a timely filed suit, pursuant to the applicable statute of limitations,

adequately protects an inmate against statute of limitations running prior to exhaustion of administrative remedies. *Id.* Plaintiff cannot avoid the consequences of the state statute of limitations and its lack of tolling for exhaustion of administrative remedies by subsequently filing a federal claim and tacking his state cause of action on to it.

Plaintiff's claims alleging a state cause for malicious prosecution are untimely filed and defendant's motion for summary judgment as to such claims should be granted. The court, therefore, finds it unnecessary to reach defendant's further arguments for dismissal of such state claims.

Plaintiff's 42 U.S.C. § 1983 Claim

Plaintiff claims that his due process rights, as guaranteed by the Fourteenth Amendment to the Constitution, to a fair trial were denied to him due to defendant's intentional or reckless failure to disclose or investigate known exculpatory leads or exonerating information, resulting in plaintiff being wrongly convicted and on death row for fourteen years, and the emotional distress and suffering related thereto.[1]

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[1] In due process cases such as this, the injury will always be mental and emotional and without a showing of prior physical injury. This court has determined the *Mason v. Schriro*, 45 F. Supp. 2d 709, 715-20 (W.D. Mo. 1999), interpretation of 42 U.S.C. § 1997e persuasive. *See* March 31, 2004, Order, this case, doc. # 30. Title 42 U.S.C. § 1997e should not be held to bar suit by and recovery of damages by an inmate in the circumstances of this case for violations of his rights under the Fourteenth Amendment Due Process Clause. *Id.* Moreover, even if section 1997e bars compensatory damages, plaintiff has a claim for

(Continued on following page)

"Reckless or intentional failure to investigate other leads offends a defendant's due process rights." *Wilson v. Lawrence County,* 260 F.3d 946, 955 (8th Cir. 2001). *See also Villasana v. Wilhoit,* 368 F.3d 976, 980 (8th Cir. 2004) (recovery of damages available under section 1983 for intentional nondisclosure of materially favorable evidence by law enforcement which results in defendant being denied a fair trial) (citing *California v. Trombetta,* 467 U.S. 479, 488 (1984)). However, "[n]egligent failure to investigate other leads or suspects does not violate due process," *Wilson,* 260 F.3d at 955, and does not provide a basis for recovery of damages under section 1983. *See Villasana,* 368 F.3d at 980 (recovery of damages under section 1983 requires proof that law enforcement intended to deprive the defendant of a fair trial).

In the instant case, plaintiff has come forward with evidence that exculpatory information was forwarded to investigator Brooks, via an IOC from Captain Gross, and that such exculpatory information, once revealed to plaintiff, was sufficient to subsequently acquit plaintiff of the murder charges that defendant Brooks was charged with investigating. Although defendant Brooks, via his deposition testimony, denies receiving such IOC, the court finds that the IOC itself, which specifically states it is directed to defendant Brooks, is sufficient evidence from which a reasonable jury could infer that defendant Brooks received such IOC. The court further finds that, based

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nominal damages. *Id.* at 720. *See also Todd v. Graves*, 217 F. Supp. 2d 958, 961 (S.D. Ia. 2002); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). Additionally, the court notes plaintiff has made a claim for punitive damages which are not limited by the restrictions of section 1997e. *Todd*, 217 F. Supp. 2d at 961; *Thompson*, 284 F.3d at 418.

upon such inference, a reasonable jury could further determine that defendant Brooks' failure to investigate the exculpatory information set forth in the IOC, and his failure to forward the IOC to the prosecutor's office as part of the murder investigation file, was the result of reckless or deliberate intent and not that of mere negligence. Additionally, the court notes that evidence of coercion is not required for a failure-to-investigate claim as asserted by defendant. The *Wilson* decision held that officials' failure to investigate additional leads did not rise to the level of recklessness, absent evidence that the confession given by the plaintiff in the case was the result of coercion. *Wilson,* 260 F.3d at 955. In the instant case, although defendant investigator Brooks had evidence which indicated plaintiff to be a suspect in the murder; such evidence did not include a confession and was not so conclusive that a failure to make further investigation into eyewitness statements, as provided by the IOC, could not be determined by a reasonable jury to be reckless or deliberate. Therefore, defendant's motion for summary judgment on plaintiff's section 1983 claims should be denied.

Qualified Immunity

The standard for qualified immunity is set forth by *Saucier v. Katz,* 533 U.S. 194 (2001). *Saucier* provides a two-part analysis to be use when determining whether a defendant is entitled to qualified immunity. The threshold question is "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officers' conduct violated a constitutional right?" The next step is to ask whether the "right was clearly established . . . in light of the specific context of the case," at the time the incident occurred. The Court goes on to explain that "[t]he question

is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards."

As set forth above, it is clearly established by the Eighth Circuit today that reckless or intentional failure to disclose or investigate known exculpatory leads offends a plaintiff's due process rights. *Wilson,* 260 F.3d at 946. Thus, plaintiff's allegations, if true, are a violation of his constitutional rights, and the first part of the *Saucier* analysis is satisfied.

The murder investigation, which led to plaintiff's conviction, occurred in August 1985. Since *Brady v. Maryland,* 373 U.S. 83, 87 (1963), it has been recognized that an individual has a liberty interest in "obtaining fair criminal proceedings." *Wilson,* 260 F.3d at 956. *See Brady,* 373 U.S. at 83 (suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution). At the time of the murder investigation, *Brady* was the controlling rule of law. In *California v. Trombetta,* 467 U.S. 479 (1984), the Court applied *Brady* in the law enforcement context. Thus, at the time of the murder investigation, the law was clearly established that failure to disclose exculpatory evidence was a violation of due process and, thus, no reasonable investigator after *Brady* could reasonably believe that it was permissible to withhold the identity of exculpatory witnesses or fail to investigate them. A precedential case need not be on all fours to clearly establish a constitutional violation; it need only be sufficiently analogous to put a reasonable officer on notice that his conduct is unconstitutional. *Hill v. McKinley,* 311 F.3d 899, 904 (8th Cir. 2001). *Brady* was sufficiently

established, at the time of the murder investigation, to put defendant on notice that failing to disclose and/or investigate known exculpatory leads was unlawful.

Furthermore, although today, the standard for violation of due process requires reckless or intentional deprivation of a liberty interest in order for such deprivation to be violation of due process, *Daniels v. Williams,* 474 U.S. 307 (1986), at the time of the murder investigation, it was clearly established that even negligent deprivations of liberty were violation of Fourteenth Amendment due process. *Parratt v. Taylor,* 451 U.S. 527 (1981).

Therefore, in viewing the facts in the light most favorable to the plaintiff, the court finds that a reasonable investigator at the time of the murder investigation, in light of the pre-existing law, would be aware that failing to disclose or investigate exculpatory leads was wrong. Thus, the two-part analysis of *Saucier* is satisfied, and defendant is not entitled to qualified immunity.

Conclusion

For the reasons set forth above, this court finds that there is a dispute of material fact as to whether defendant's conduct was reckless or intentional failure to disclose or investigate exculpatory leads. Such factual dispute must be resolved by a jury. Defendant's motion for summary judgment is denied as to plaintiff's 42 U.S.C. § 1983 claims.

IT IS, THEREFORE, ORDERED that defendant's motion for summary judgment is granted, in part, and denied, in part [133]. It is further

ORDERED that defendant's motion for summary judgment is granted on plaintiff's state law malicious prosecution claims. It is further

ORDERED that defendant's motion for summary judgment is denied on plaintiff's 42 U.S.C. § 1983 claims.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: 11-17-05

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ERIC CLEMMONS, Register No. 99956, Plaintiff, v. BILL ARMONTROUT, et al., Defendants.	)	No. 03-4033-CV-C-SOW (Filed Sep. 19, 2005)

ORDER

Plaintiff, an inmate confined in a Missouri penal institution, brought this case under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343.

In support of his claims for relief, plaintiff states he was deprived of his liberty interest in a fair trial due to defendants' intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information, resulting in plaintiff being wrongly convicted for murder and on death row for fourteen years, and seeks relief for the physical, emotional, and economic damages related thereto.

On February 14, 2005, defendants Armontrout, Acree, Eberle, Cline and Gross filed a motion for summary judgment. Defendants argue they are entitled to judgment as a matter of law as to plaintiff's 42 U.S.C. § 1983 substantive due process claim and pendant state law claims.

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op.,* 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. *Celotex,* 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." *Hass v. Weiner,* 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan,* 864 F. 2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed. R. Civ. P. 56(c).

Statement of Facts

Plaintiff Eric Clemmons is an inmate in the custody of the Missouri Department of Corrections. Plaintiff had been convicted of capital murder and assault in 1983, and was under sentence of life without the possibility of parole for fifty years when the facts giving rise to this case occurred.

Plaintiff's claims relate to the murder of inmate Henry Johnson on August 7, 1985, at Missouri State Penitentiary (MSP). Johnson was stabbed three times and later died from his injuries. Corrections Officer Thomas Steigerwald claimed to have witnessed the stabbing and identified plaintiff Clemmons as the person who stabbed inmate Johnson. At the time of the murder, Steigerwald called for assistance, and defendant Gross, a corrections supervisor (Captain) at MSP, responded to the call. Plaintiff was taken into custody by defendants Steigerwald and Gross. Subsequently, defendant Gross returned to the scene of the stabbing and informed officers to search for the assault weapon. No weapon was located. Gross thereafter continued to supervise a cursory investigation into the stabbing incident until an investigator arrived to conduct the official investigation. While Gross was conducting his investigation, inmate Dwight Clark advised Gross that he (Clark) had witnessed two men assaulting Johnson, and described both assailants as being black, and thought one was inmate Fred Bagby, but only knew the second inmate by sight. Gross, subsequently, on that same date, prepared an inter-Office Communications (IOC) to George Brooks, the MSP investigator assigned to the murder investigation, which outlined Gross' investigation and his conversation with inmate Clark. In the August 7, 1985, IOC regarding Clark, Gross notified Investigator

Brooks of Clark's statement, but qualified the information with a statement that "[w]hen questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue." The IOC indicates that defendants William Armontrout, Warden; Donald Cline, Assistant Warden; Robert Acree, Assistant Superintendent; and Major James Eberle, were forwarded a copy. Defendant Gross states in his deposition that he did not speak to or search the cell of Fred Bagby, but that he checked the out-count list and that Bagby was not listed, and that is why he discounted Clark's statement. Gross further states, however, that there would have been more than one out-count list, and/or that it is possible an inmate could be in the prison yard without being listed on the out-count. Gross's failure to investigate further could be seen as negligent, but not reckless or deliberate indifference in light of his referral of the matter to Investigator Brooks.

Investigator Brooks (now deceased) stated in his deposition that he had no recollection of seeing the IOC from Gross, and that he did not follow up with inmates Clark or Bagby as a part of his investigation. When Brooks completed his investigation into the murder, he forwarded his investigation file to Warden Armontrout, who then forwarded it to the Cole County Prosecuting Attorney for review. The file forwarded to the prosecuting attorney did not contain the IOC written by Capt. Gross regarding the statements made by inmate Clark.

Inmate James Mayes states, via sworn affidavit, that it became common knowledge around MSP that Fred Bagby and Kenneth Reed had stabbed Johnson and that Eric Clemmons was wrongly blamed for the murder. Accordingly, Mayes states he personally spoke with Robert Acree, Donald Cline, James Eberle, Thomas Steigerwald,

and Bill Armontrout and advised them of this information. Mayes states these individuals indicated they would investigate, but that he was never contacted further. None of the defendants remember such a conversation with inmate Mayes, but indicate that if it had happened, they would have referred the information to Investigator Brooks. Mayes states he even wrote a letter to the prosecutor's office asking that they investigate.

The Cole County Prosecuting Attorney charged plaintiff Clemmons with the murder of inmate Johnson. Plaintiff was tried and convicted of the murder of inmate Johnson in 1987, and was sentenced to death.

In 1997 the United States Court of Appeals for the Eighth Circuit granted plaintiff's writ of habeas corpus and vacated his conviction. *See Clemmons v. Delo,* 124 F.3d 944 (8th Cir. 1997). The court granted habeas, citing a constitutional violation in the failure to disclose exculpatory evidence (Gross' memorandum (IOC) regarding statements made by inmate Clark), and found there was a reasonable probability that the verdict of the jury would have been different were it not for the violation of Clemmons' constitutional rights. The court went on to state that "[w]e cannot say with confidence that the jury would have reached the same verdict when presented with an eyewitness who accused a different inmate of the crime within an hour of the murder, the very same inmate that three other witnesses had also accused of the crime." *Id.* at 951.

On February 18, 2000, a jury acquitted plaintiff Clemmons of the murder of inmate Johnson. On February 24, 2001, pursuant to grievances filed by Clemmons with the Department of Corrections, plaintiff's prison records

were expunged of the murder of Johnson. Plaintiff filed his claim under 42 U.S.C. § 1983 on February 20, 2003.

Defendants Armontrout, Acree, Eberle, Cline and Gross raise several issues for summary judgment.

First, defendants argue that plaintiff's claims are barred by the statute of limitations, citing *Wilson v. Garcia,* 471 U.S. 261, 266-68 (1985). "[T]he length of the limitations period, and closely related questions of tolling and application, are to be governed by state law." *Id.* at 269. Thus, the court borrows not only the state's limitations period, but also the state's tolling law. *See Uhl v. Swanstrom,* 876 F. Supp. 1545, 1556 (N.D. Iowa 1995). Missouri law controls this issue. Plaintiff's claims were not ripe until he was acquitted on February 18, 2000, and the statute of limitations did not start to run until that time. *See, e.g., Arana v. Reed,* 793 S.W.2d 224. (Mo. App. 1990). Thus, the claim was timely filed.

Defendants next argue that plaintiff cannot show personal involvement on the part of each defendant. Although plaintiff has come forward with some evidence that each defendant knew that one or more inmates believed Clemmons was not involved in the murder of inmate Johnson, none of these defendants were directly involved in the investigation of this case. Each of these defendants, other than Gross, had supervisory positions. Had they received any information concerning the case, they would merely have forwarded it to the investigating officer, Brooks, whose report would then have been forwarded to the prosecuting attorney. Plaintiff has come forward with no evidence from which a reasonable jury could infer that any of these defendants was deliberately

indifferent to or reckless with respect to whether the investigation was properly conducted by Investigator Brooks or whether exculpatory leads were or were not properly followed.

There is no dispute that defendant Gross forwarded the information he received from Clark to the investigator and to the other defendants, together with his opinion concerning the credibility of that information. In light of the fact that a corrections officer, Steigerwald, claimed to have witnessed the stabbing and identified plaintiff Clemmons, no jury, given the evidence which plaintiff has brought forward, could conclude that Gross was reckless or deliberately indifferent to plaintiff's right to a fair investigation. Thus, these defendants are entitled to summary judgment because no reasonable jury could conclude, based on the evidence available to this court, that any of them was deliberately indifferent to or reckless with respect to whether defendant Brooks conducted a proper investigation in the case.

Defendants also assert they are entitled to summary judgment because plaintiff cannot show they denied him any liberty interest because (1) plaintiff has no procedural due process claim, (2) plaintiff has no substantive due process claim and (3) they are entitled to qualified immunity. Summary judgment is denied on these claims for the reasons previously set forth in orders of this court.

Defendants also assert that plaintiff's false imprisonment and malicious prosecution claims fail as a matter of law. Summary judgment on these claims is granted for the reasons set forth in defendants' memorandum.

Defendants claim that they are entitled to official immunity is denied. If there were evidence from which a jury could find recklessness or deliberate indifference as to plaintiff's rights to a fair investigation, defendants' obligation to forward such information would not be discretionary; it would be ministerial and they would have an obligation to do that. There is, under the law, no discretion about whether to forward known exculpatory evidence; however, this issue is moot in light of this court's prior rulings.

Defendants also claim they are protected from liability by the Public Duty Rule. That ground for relief is denied. The Public Duty Rule to which defendants refer is a duty owed to the general public. The duty in this case is not a duty to the general public, but was a duty owed, if any, specifically to plaintiff. Thus, the Public Duty Rule is inapplicable.

Defendants also argue that plaintiff's state law claims are barred by the Eleventh Amendment. Summary judgment on that claim should be denied, in part, and granted, in part. This lawsuit is against the defendants in both their individual and official capacities. However, although the court would sustain defendants' motion as to plaintiff's claims against them in their official capacities, and deny it as to their individual capacities, because this court is granting summary judgment on their behalf, this issue is moot. *See Thomas v. Gunter,* 32 F.3d 1258, 1261 (8th Cir. 1994) (citing *Edelman v. Jordan,* 415 U.S. 651, 663 (1974)).

IT IS, THEREFORE, ORDERED that the motion of defendants Armontrout, Acree, Eberle, Cline and Gross is granted and plaintiff's claims against these defendants are dismissed [102].

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: 9-15-05

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-4140

Eric Clemmons,

Appellee

v.

William Armontrout, Warden, et al.,

and

Estate of George Brooks,

Appellant

No: 06-1099

Eric Clemmons,

Appellant

v.

William Armontrout, Warden and George Brooks,

Appellees

Estate of George Brooks,

Appellee

and

Alonzo Gross, et al.,

Appeal from U.S. District Court for the
Western District of Missouri – Jefferson City
(2:03-cv-4033-SOW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 19, 2007

Order Entered at the
Direction of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

(2)

No. 06-1653

Supreme Court, U.S.
FILED
JUL 12 2007
OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

ERIC CLEMMONS,
Petitioner,

v.

ESTATE OF GEORGE BROOKS,
AND ALONZO GROSS,
AND WILLIAM ARMONTROUT
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO QUESTIONS PRESENTED

This case arises from Petitioner's claim that he stated a constitutional violation, cognizable under 42 U.S.C. §1983, by asserting that an investigator and other officials in a correctional facility allegedly failed to provide to a prosecutor arguably exculpatory evidence that the investigator had determined was not credible and by so doing violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). His "Questions Presented" deal not with the merits of his claim, but with whether the decision below conflicts with those of that and other courts. The body of his petition suggests that if certiorari is granted, he would ask the Court to answer the following questions:

1. Can a criminal defendant state a *Brady* claim against a corrections investigator and his superiors on the basis that they failed to provide to a prosecutor an exculpatory statement that they found to be false?

2. Was the Eighth Circuit's application of its "recklessness" standard so far out of line with the Eighth Circuit's own precedents as to merit reversal?

3. When the facts are undisputed that one corrections officer obtained an exculpatory statement, but after that brief involvement turned the matter over to another officer who completed the investigation, prepared a report, and transmitted it to his superior, and the subsequent transmission to the prosecutor may not have contained the statement, is the question whether the first officer's failure to ensure transmittal of the statement to the prosecutor one of fact that must be decided by a jury?

4. Does the statement by one inmate that he told a warden that a defendant was wrongly convicted of murder create an issue of fact as to the personal involvement of the warden with regard to disclosure of a statement made by another inmate about a murder?

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STATEMENT OF THE CASE

This matter comes to Court on summary judgment. As the Court recognized in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), to defeat summary judgment Clemmons may not simply rest on the allegations in his petition but must present evidence that shows a material dispute of fact. Clemmons, instead of presenting evidence, relies on accusations that are unsupported by the record. The undisputed facts of this case are as follows:

On August 7, 1985, while Clemmons was incarcerated at the Missouri State Penitentiary ("MSP"), fellow inmate Henry Johnson was stabbed three times, leading to his death. Eighth Circuit Appendix of Estate of George Brooks ("Brooks App.") at 111-12. Corrections Officer Thomas Steigerwald witnessed the stabbing and identified Clemmons as the perpetrator.[1] *Id.* at 106. When the assault occurred, Officer Steigerwald called for assistance, and Respondent Alonzo Gross, a Captain at MSP, responded to the call. *Id.* Steigerwald and Gross caught Clemmons and escorted him to a holding cell. *Id.* at 105-06. They noticed bloodstains on Clemmons's sweatshirt and tennis shoes. *Id.* at 111-16.

While in the holding cell, Clemmons told Gross, "I guess they got me."[2] *Clemmons v. Delo*, 124 F.3d 944, 946 (8th Cir. 1997) And when officers searched the cell of the

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[1] Clemmons asserts in his petition that Officer Steigerwald testified in the 2000 trial that it was dark outside at the time of the stabbing and that Steigerwald was more that 80 yards away. Petition at 3. That testimony was not part of the record in this case. And from the 1987 trial record, the Eighth Circuit concluded that Steigerwald was "10 to 15 feet away." *Delo*, 124 F.3d at 951 (8th Cir. 1997).

[2] In his statement of facts, Clemmons refers to Gross's testimony at Clemmons's criminal trial but that testimony is not part of the record in this case.

inmate Steigerwald saw standing next to Clemmons at the time of the attack, they found books and a hat belonging to Clemmons that also had bloodstains on them. Brooks App. at 111-16.

After capturing Clemmons, Gross returned to the stabbing scene and ordered a search for the weapon. *Id.* During this search, inmate Dwight Clark approached Gross and told him that he had witnessed two men assaulting Johnson. Brooks App. at 104. He described both assailants as being black, stated his belief that one was inmate Fred Bagby, and explained that he only knew the second inmate by sight. *Id.* Gross questioned inmate Clark, reviewed the out-count list, and concluded that inmate Clark's statement was not credible. *Id.*

After receiving and investigating inmate Clark's statement, Gross prepared an Inter-Office Communication ("IOC") outlining what he had done to investigate the stabbing. *Id.* Gross noted his reservations about inmate Clark's statement, concluding, "When questioned in detail Clark did not make sense and further investigation reflects that Clark's statement is untrue." *Id.* He sent the IOC to Respondent Brooks, the MSP investigator assigned to the murder investigation. *Id.*

Prior to the attack, Clemmons and inmate Johnson had shared a cell at MSP but were separated, on Brooks's initiative, after Brooks learned that the two inmates had problems with each other. *Id.* at 233.

After Brooks completed his investigation, he forwarded an investigation report to Respondent Armontrout, who then forwarded that report to the Cole County Prosecuter.[3] *Id.* at 188-89. The initial report

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[3] Clemmons asserts that Brooks chose not to interview other eyewitnesses or pursue important leads. Petition at 4.

forwarded to the prosecuting attorney by Armontrout did not contain the IOC.[4] *Id.* at 111-16.

The prosecuting attorney charged Clemmons with the murder of inmate Johnson; Clemmons was convicted in 1987. Brooks App. at 80.

In 1997, Clemmons filed a petition for writ of habeas corpus, alleging that his counsel was never shown the exculpatory evidence, the IOC, prior to his trial. *See Delo*, 124 F.3d at 947. The State responded that the IOC was in inmate Johnson's inmate file, which was reviewed by Clemmons' counsel. The Eighth Circuit did not resolve the issue of whether the IOC had been made known to Clemmons's counsel because, the court concluded, "[w]hether framed as an ineffective assistance of counsel claim or as a *Brady* claim, Clemmons's claim undeniably states a constitutional violation." *Id.* at 949. The court granted the writ. Id. at 956.

The State then retried Clemmons for the Johnson murder; this time, a jury acquitted him.

Approximately three years later, Clemmons filed this lawsuit under 42 U.S.C. §1983, alleging that he was deprived of his liberty interest in a fair trial due to Respondents' intentional or reckless failure to disclose or investigate exculpatory leads or exonerating information.

There is no evidence in the record of any "eyewitnesses" other than Officer Steigerwald and inmate Clark.

[4] Clemmons repeatedly asserts that this report was the only contact Brooks, or any prison official, had with the prosecutor. Petition at 5. There is no evidence to support this assertion, nor to support his conclusion that the IOC was not later provided to the prosecutor.

Additionally, Clemmons misstates the testimony of Armontrout. Petition at 5. Armontrout testified at his deposition that it was not uncommon for the initial report to the prosecutor's office not to contain all the information discovered in the investigation.

In September 2005, the Honorable Scott O. Wright, United States District Judge, entered summary judgment for Gross and Armontrout. Petition Appendix ("Pet. App.") at 24-32. The court found that, as a matter of law, Clemmons had failed to present sufficient evidence to prove Gross and Armontrout had sufficient "personal involvement" in the deprivation of Clemmons's constitutional rights. Pet. App. at 29-30.

In November 2005, the district court entered summary judgment for Brooks with respect to Clemmons's state law claims, but denied the motion with respect to his constitutional claim, holding that Brooks was not entitled to qualified immunity. Pet. App. at 11-23. The court held that a reasonable jury could determine that Brooks's failure to investigate the information set forth in the IOC, and his failure to forward the IOC to the prosecutor's office, was the result of reckless or deliberate intent and not that of mere negligence. *Id.* at 20.

In February 2007, the Eighth Circuit reversed the denial of summary judgment as to Brooks and affirmed the summary judgment for Gross and Armontrout. Pet. App. at 10.

With respect to Brooks, the Eighth Circuit held that "Clemmons adduced no evidence that Brooks acted intentionally, recklessly, or in bad faith when he failed to disclose the IOC to the prosecutor and failed to investigate Clark's statement that Bagby murdered Johnson." *Id.* at 8. Because Brooks did not violate Clemmons's constitutional rights, the court reversed the denial of summary judgment. *Id.*

The Eighth Circuit held that Gross and Armontrout had only "minimal personal involvement in the investigation." *Id.* at 9-10. Gross was only involved in the investigation until Brooks arrived to take it over. And forwarded the information he received from inmate Clark

to Brooks. *Id.* The Eighth Circuit held that Armontrout's general supervisory duties were insufficient to establish personal involvement in the investigation. The Eighth Circuit noted, specifically, that Armontrout had no direct involvement in the investigation and that Brooks was the person who assembled that packet of investigatory materials for the prosecutor. *Id.* The Eighth Circuit affirmed the district court's decision that Clemmons's failed to establish sufficient personal involvement by either Gross or Armontrout to establish liability pursuant to 42 U.S.C. § 1983. Pet. App. at 10.

REASONS TO DENY THE WRIT

I. The Eighth Circuit's decision regarding Clemmons's claims against Brooks was consistent with the Court's precedents that impose *Brady* obligations on prosecutors.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. To comply with *Brady*, a prosecutor must "learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419 (1995). The Court's holding in *Brady* ensures the proper disclosure of exculpatory evidence by the prosecution in criminal proceedings. Under *Brady*, the prosecutor is responsible for failing to produce materially favorable evidence regardless of fault, that is, regardless of whether the suppression was intentional or in bad faith. 373 U.S. at 87.

The Court has never imposed this absolute duty on law enforcement officials other than prosecutors. To the contrary, the Court has rejected the argument that *Brady* obligations should be shifted from prosecutors to other state actors. In *Kyles*, the state urged this Court to find that the prosecutor had not violated *Brady* because the prosecution had never been informed of the exculpatory evidence at issue in that case. This Court rejected that argument, finding that it would "amount to a serious change of course from the *Brady* line of cases." *Kyles*, 514 U.S. at 438. Instead, the Court stated that prosecutors should establish procedures and regulations to ensure communication of all information to each attorney working on every case. *Id.* (*citing Giglio v. United States*, 405 U.S. 150, 154 (1972)).

To reach beyond the prosecutor, Clemmons cites *Youngblood v. West Virginia*, --- U.S. ----, 126 S.Ct. 2188 (2006). There the Court may have moved beyond *Brady* and *Kyles* – but not so far as Clemmons suggests. In *Youngblood*, the Court stated that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Id.* at 2190 (*quoting Kyles*, 514 U.S. at 438)). The Court continued to quote from *Kyles*: "The individual prosecutor has a duty to learn of any favorable evidence known to the other acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437, quoted at 126 S.Ct. at 2190. Despite its reference in *Youngblood* and *Kyles* to other actors, the Court has always placed ultimate responsibility for complying with *Brady* on prosecutors. They are in the best position to determine what may or may not become *Brady* material throughout the criminal process.

Not surprising, given that placement of responsibility, nothing in *Brady*, *Kyles*, or *Youngblood* – or in any case referenced by Clemmons –suggests that a police officer or a corrections officer or someone else who may encounter *Brady* information is subject to civil liability for merely failing to ensure that it is provided to a defendant. The Eighth Circuit's refusal to create such liability is not in conflict with any decision Clemmons cites.

II. The Eighth Circuit's decision was consistent with its usual course of judicial proceedings.

Clemmons argues that "the Eighth Circuit strayed from established authority, usurped the jury's role, improperly took facts in the light most favorable to Defendants, and found that, as a matter of law, Mr. Brooks's actions were not intentional or reckless. Petition at 13. Clemmons finds "the Eighth Circuit's usual course of judicial proceedings" in a single decision, *Wilson v.*

Lawrence County, Mo., 260 F.3d 946 (8th Cir. 2001). There, the Eighth Circuit held the negligent failure to investigate other leads does not violate due process and a plaintiff must show that the defendants acted with at least a reckless intent. *Id.* at 955-56. In *Wilson*, a former prisoner brought claims pursuant to §1983 alleging that police officers coerced him into confession to a crime he did not commit; used false testimony to secure his conviction; and failed to investigate other suspects. *Id.* at 950. In regards to Wilson's claim that the defendants failed to investigate additional suspects, the Eighth Circuit held that, absent the evidence of the coercion of Wilson's confession and the reliance on knowingly false evidence, the failure to investigate additional leads, alone, would not support a claim of recklessness or deliberate intent and would not comprise a constitutional violation. *Id.* at 955.

Assuming that departure from a single prior precedent could constitute a basis for granting certiorari, this would not be such a case. The two cases are easily distinguishable, for Clemmons, unlike Wilson, presents no evidence that the State actors relied on false evidence or coercion; Clemmons relies exclusively on allegations of potential leads that Brooks did not follow. This is precisely the kind of claim that the Eighth Circuit in *Wilson* held would not constitute a constitutional violation.

Nor did the Eighth Circuit depart from *Wilson* by failing to follow the well-established rule that on summary judgment it had to view the facts in a light most favorable to Clemmons. Petition at 13. To make his claim, Clemmons ignores what the court really said and did in *Wilson*. There, the court said that at the summary judgment stage, the reviewing court should take as true those facts asserted by the non-moving party that are properly supported by the record. *Wilson*, 260 F.3d at 951. Here, Clemmons fails to identify what facts were not taken in the light most favorable to him that are properly

supported by the record. Moreover, Clemmons does not identify any factual disputes in the record that the Eighth Circuit ignored and would have precluded its finding in favor of granting Brooks judgment as a matter of law. The material facts of this case remain undisputed and as the Eighth Circuit correctly held, the issue before the court was an issue of law, not fact, and summary judgment was appropriate. Pet. App. at 8.

Furthermore, the Eighth Circuit did not err in concluding that Clemmons failed to present evidence that Brooks either recklessly or intentionally failed to investigate additional leads or disclose exculpatory evidence. *Id.* Clemmons seems to believe that to obtain summary judgment, Respondents had to present undisputed evidence that they investigated everything. But such exhaustion is not the law. For example, as the Court has held that when motive is a critical issue, summary judgment is appropriate if the plaintiff fails to "identify affirmative evidence from which a jury could find that plaintiff has carried his or her burden of proving the pertinent motive." *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998). And this Court has held that the Constitution does not require that an official "independently investigate every claim of innocence," or "to perform an error-free investigation of such a claim." *Baker v. McCullon*, 443 U.S. 137, 145-46 (1939).

In this case, although Clemmons argues that Brooks could have done more in his investigation, there is no evidence that Brooks acted in bad faith, that is, engaged in "a conscious effort to suppress exculpatory evidence." *California v. Trombetta*, 467 U.S. 479, 488 (1984). In *Wilson*, were there was evidence the defendants may have coerced Wilson and intentionally relied on false evidence. But, there is no evidence that Brooks made any conscious effort to suppress evidence. The only alleged eyewitness account that Brooks did not independently pursue came from inmate Clark. And, Brooks became aware of inmate Clark's account from

Gross's IOC which stated that inmate Clark's statement was untrue. Clemmons points to no evidence as to why Brooks had to doubt Gross's assessment of inmate Clark's story.[5]

Also supporting the Eighth Circuit conclusion that there is no evidence of bad faith by Brooks is the fact that the Clemmons's only evidence to support his claim that Brooks withheld exculpatory evidence is the omission of the IOC (and thus the Clark statement) from the initial report of the murder sent by Brooks to Armontrout and forwarded to the prosecutor's office, which identified Clemmons as a suspect. As Armontrout testified, it was not unusual for such a reports not to contain all the evidence obtained by investigators. Brooks App. at 191. There is no evidence in the record before the Court that the IOC was not given to prosecutors in subsequent disclosures. Furthermore, as the State argued in Clemmons's habeas proceeding, the IOC was made a part of Johnson's prison file which the State provided to Clemmons's criminal attorney. *Delo*, 124 F.3d at 947, fn. 2. Again, Clemmons has failed to present any evidence regarding when the prosecution was given the IOC or when his criminal attorney was made aware of the IOC.[6]

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[5] In his third point, when discussing the alleged liability of Armontrout, Clemmons relies on an affidavit from inmate Mayes, who states that it was "common knowledge" that Clemmons did not stab inmate Johnson. But there is no evidence Brooks was aware of inmate Mayes's statements. And even if Brooks was aware of these statements, inmate Mayes statements are based on gossip and speculation, not personal knowledge or fact. There is no evidence that if Brooks talked to Mayes, he would have discovered any useful information or evidence tending to disprove what the evidence made abundantly clear, that Clemmons was a suspect in the murder of inmate Johnson.

[6] Clemmons's only evidence to support his claims is that he, personally, was not aware of the IOC until after he was convicted of inmate Johnson's murder. This is not evidence that Brooks did not produce this information to the prosecutors.

III. The Eighth Circuit's decision regarding Clemmons's claims against Gross and Armontrout does not conflict with Second Circuit case law.

Clemmons argues that the Eighth Circuit's holding conflicts with the Second Circuit approach in that: 1) the Eighth Circuit fails to recognize personal involvement as a question of fact; 2) Gross and Armontrout were not subject to liability because of their on "minimal" involvement; and 3) the Eighth Circuit does not recognize personal involvement through failure to remedy a wrong. Petition at 14. The listed "conflicts" are wholly chimerical. Although the Second and Eighth Circuits vary slightly in the wording of their approach to the "personal involvement" requirement of §1983, the Eighth Circuit's analysis does not conflict with the Second Circuit.

Both the Eighth and Second Circuits hold that under §1983, a showing of a defendant's personal involvement in alleged constitutional violations is a prerequisite to liability. *Cox v. Sugg,* 484 F.3d 1062, 1067 (8th Cir. 2007); *Williams v. Smith,* 781 F.2d 319, 323 (2nd Cir. 1986). Both circuits have also hold that liability cannot rest on a theory of respondeat superior. *Hahn v. McLey*, 737 F.2d 771, 773 (8th Cir. 1984); *Hernandez v. Keane*, 341 F.3d 137, 144 (2nd Cir. 2003). And, both circuits hold that liability for personal involvement requires proof of a "causal link" between the defendant's actions and the injury, or "direct responsibility" for the alleged deprivation of rights. *Mayorga v. Missouri*, 442 F.3d 1128, 1132 (8th Cir. 2006); *Poe v. Leonard*, 282 F.3d 123, 140 (2nd Cir. 2002).

In the Second Circuit, in order to prove "personal involvement," a plaintiff must demonstrate that the defendant has 1) directly participated in the violation; 2) has failed to remedy a wrong when acting in a

supervisory capacity; 3) has created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or 4) was grossly negligent in managing subordinates who caused the unlawful condition or event. *Williams*, 781 F.2d at 323-24. In the Eighth Circuit, a defendant can be found to be personally involved where the defendant 1) directly participated in the constitutional violation; 2) where a supervisory official, after learning of the alleged violation, failed to take adequate remedial measures; 3) where corrective action amounted to deliberate indifference to, or tacit authorization of, violative practices; or 4) where a supervisor breached his duty to adequately train or supervise the actions of subordinates. *Cox*, 484 F.3d at 1067. The Eighth and Second Circuit approaches to "personal involvement" under §1983 are substantially the same.

Clemmons correctly asserts that the Second Circuit, in *Williams,* stated that personal involvement is a question of fact for the jury. 781 F.2d at 323. Clemmons takes the Second Circuit's statement out of context, however. As the Second Circuit stated, "Since personal involvement is a question of fact we are governed by the general rule that summary judgment may be granted only if no issues of material fact exist and the defendants is entitled to judgment as a matter of law." *Id.* In fact, in *Williams*, the Second Circuit affirmed summary judgment in favor of a prison guard whose involvement in the claim was limited to preparing and submitting a report that the inmate claimed was false. *Id.* at 324.

Clemmons incorrectly asserts that the Eighth Circuit "does not recognize" that personal involvement is a question of fact. But in *Mayorga,* the Eighth Circuit stated that in order to establish personal liability, the plaintiff must allege "specific facts of personal involvement." 442 F.3d at 1132. Nothing here suggests that the Eighth Circuit removed those facts from the usual summary judgment routine.

And summary judgment was available here because the specific facts of Gross and Armontrout's personal involvement are not disputed. Clemmons does not identify a single fact that he believes remains in dispute that would preclude summary judgment for either Gross or Armontrout. Instead, what Clemmons actually argues is that the facts in this case are, as a matter of law, sufficient to state a claim against Gross and Armontrout. Clemmons misinterprets the Eighth Circuit's holding, and erroneously asserts that the "length or degree" of a defendant's personal involvement is not significant. Even if Clemmons were correct, a court cannot impose liability upon a defendant, no matter how significant his personal involvement, absent proof that the involvement had a causal link to the alleged constitutional violation. *Poe*, 282 F.3d at 140; *Mayorga*, 442 F.3d at 1132. And, Clemmons has failed to show either sufficient facts to support his claim or that those facts create a causal link to his injury.

Clemmons also asserts that the Eighth Circuit's holding conflicts with the Second Circuit's approach to personal involvement in that the Eighth Circuit did not consider a defendant's failure to "remedy a wrong" as a violation of Clemmons's constitutional rights. Petition at 15. But as described above, in both the Eighth and Second Circuits, a defendant may be found to be "personally involved" for purposes of §1983 when he fails to take adequate remedial action. *Williams,* 781 F.2d at 323; *Cox,* 484 F.3d at 1067. Although the wording differs slightly, the approaches of both the Second and Eighth Circuits take into consideration whether a defendant has taken action to remedy a wrong. *Williams,* 781 F.2d at 323; *Cox,* 484 F.3d at 1067.

In this case, Clemmons failed to prove all of the elements of the "personal involvement" requirement, specifically that Gross and Armontrout's personal involvement had a "causal link" to the alleged

constitutional violations. Federal Rule of Civil Procedure 56(c) allows for summary judgment when there is no issue of material fact, and a moving party is entitled to judgment as a matter of law. Because causation and fault are essential to holding a defendant liable for personal involvement, failure to establish those elements entitled Gross and Armontrout to judgment as a matter of law, and therefore summary judgment was proper.

CONCLUSION

For the reasons stated above, the Court should deny the writ.

Respectfully Submitted,

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No. 06-1653

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In The

Supreme Court of the United States

ERIC CLEMMONS,

Petitioner,

v.

ESTATE OF GEORGE BROOKS,
and
ALONZO GROSS and WILLIAM ARMONTROUT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S RESPONSE TO RESPONDENTS' CHARACTERIZATION OF THE QUESTIONS PRESENTED

In their brief in opposition to Mr. Clemmons's petition for writ of certiorari, the petitioners have improperly attempted to rewrite the questions presented to this Court by Mr. Clemmons. This Court has established that it is the petitioner who controls the scope of the questions presented. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). "The petitioner can generally frame the question[s] as broadly or as narrowly as he sees fit." *Id.* And the "statement of any question is deemed to compromise every subsidiary question fairly included therein." SUP. CT. R. 14.1(a); *see also City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 n.8 (2005). Accordingly, Mr. Clemmons respectfully requests that the Court disregard the petitioners' attempt to improperly control and limit the issues presented for review.

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PETITIONER'S RESPONSE TO RESPONDENTS' STATEMENT OF THE FACTS

The respondents to Mr. Clemmons's petition begin their recitation of the "undisputed facts" of this case by accusing Mr. Clemmons of relying "on accusations that are unsupported by the record." Opposition at 1. Mr. Clemmons has detailed the factual support for his arguments in his Eighth Circuit briefing and, in accordance with this Court's Rule 14.1(g), has concisely summarized the material facts in his petition for writ of certiorari. Mr. Clemmons stands by the facts as he has pleaded them but will briefly address the specific facts that respondents have called into question.

First, in Footnote 1 of the respondents' opposition brief, the respondents take exception with Mr. Clemmons's reference to the fact that Officer Steigerwald testified during Mr. Clemmons's criminal retrial in 2000 that he was approximately 80 yards away from the attack on Henry Johnson. Opposition at 1. Officer Steigerwald has refused to answer Mr. Clemmons's complaint in this case or otherwise participate in the present litigation. Therefore, his prior testimony is likely admissible evidence in this case. The precise distance from which Officer Steigerwald claims to have witnessed the attack on Henry Johnson, however, is not a fact that is essential to the determination of the questions before this Court. More important is whether there were other witnesses, including Dwight Clark, whose vantage point may have been better than Officer Steigerwald's. The record is clear on this issue. Officer Steigerwald has admitted under oath that it is "possible that inmates had a better view of the incident than he did." *Clemmons v. Delo*, 124 F.3d 944, 951 (8th Cir. 1997).

Next, in Footnote 3 of their opposition brief, the respondents state that "[t]here is no evidence in the record of any 'eyewitnesses' other than Officer Steigerwald and inmate Clark." Opposition at 2-3. Mr. Clemmons takes exception with this statement. The record is clear that there were multiple people in the vicinity of the attack on Henry Johnson. The Eighth Circuit has concluded that there was a "group of inmates" standing in the area where the attack occurred. *Clemmons v. Delo*, 124 F.3d at 946. This conclusion is consistent with Mr. Clemmons's and Mr. Brooks's testimony in this case. Brooks App. at 73-74, 227-228. Further, the record is clear that there were "outcount lists" available to the respondents, which provided the names of the inmates who had permission to be in the area where the attack occurred. Brooks App. at 94, 228-229. Surely, some of the inmates in the vicinity of the attack were eyewitnesses.

If the respondents are asserting that these individuals were not properly interviewed such that memoranda documenting their eyewitness accounts can be used as evidence in this case, Mr. Clemmons is in full agreement. The duty to identify and interview these eyewitnesses rested squarely on the shoulders of the respondents and, as Mr. Clemmons has argued throughout this litigation, the respondents failed miserably in carrying out their duty. Mr. Gross and Mr. Brooks both testified that they did not interview the vast majority of the inmates identified on the outcount lists. Brooks App. at 94, 228-229. Similarly, Mr. Armontrout testified that he did not take action to identify or interview the potential eyewitnesses. Brooks App. at 192. Therefore, any lack of evidence of eyewitness accounts of the murder is the result of the respondents'

own failures and should not be used to help them avoid liability in this action.

Finally, in Footnote 4 of their opposition brief, the respondents claim that Mr. Clemmons "repeatedly asserts that this report [the investigation packet prepared by Mr. Brooks and sent to the prosecuting attorney by Mr. Armontrout] was the only contact Brooks, or any prison official, had with the prosecutor." Opposition at 3. In support of this claim, the respondents cite to Page 5 of Mr. Clemmons's petition. There is no such assertion on Page 5, or on any other page, of Mr. Clemmons's petition.

In the same footnote, the respondents assert that Mr. Clemmons has misstated Mr. Armontrout's testimony, although they do not specifically identify the alleged misstatement. As set forth in Mr. Clemmons's petition, Mr. Armontrout testified that he was responsible for sending the investigation packet at issue to the prosecuting attorney. Brooks App. at 188-189. Mr. Armontrout also testified that Mr. Gross's inter-office communication ("IOC") was the type of evidence that was typically included in such investigation packets. Brooks App. at 188-191. Yet he admitted that the IOC was not included in the packet documenting the investigation into Henry Johnson's murder. Brooks App. at 191.

Despite the respondents' attempts to cast doubt on a handful of the facts he has presented, Mr. Clemmons stands by the factual statement contained in his petition. It complies with Supreme Court Rule 14.1(g) and provides the Court with an accurate statement of the case.

PETITIONER'S RESPONSE TO RESPONDENTS' REASONS TO DENY THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IS INCONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT

In *Youngblood v. West Virginia*, 126 S. Ct. 2188 (2006), this Court stated that "*Brady* suppression occurs when the government fails to turn over even evidence that 'is known only to police investigators and not to the prosecutor.'" *Id.* at 2190. The respondents, while acknowledging that *Youngblood* "may have moved beyond *Brady*," argue that prosecutors are the only government actors who can be held liable for the failure to produce exculpatory evidence. Opposition at 6-7. For this proposition, the respondents cite *Kyles v. Whitley*, 514 U.S. 419 (1995).

In *Kyles*, the Court determined that a prosecutor should not be shielded from liability under the *Brady* doctrine simply because he has not been informed that exculpatory evidence exists. *Id.* at 438. Nowhere in the *Kyles* opinion, however, did the Court determine that the officer who withheld the exculpatory evidence should not also be subject to liability. Here, Mr. Clemmons is simply asking this Court to clearly hold that when procedures for providing evidence to prosecutors are ignored by corrections officers or other state actors and, as a result, material evidence is withheld from the defense, such state actors should be subject to liability, along with prosecutors under the *Brady* doctrine. Such a holding would not conflict, in any way, with *Kyles*.

As the Court noted in *Kyles*, "no one doubts that police investigators sometimes fail to inform a prosecutor of all they know." *Kyles*, 514 U.S. at 438. A clear message from

this Court regarding liability for such failures would go a long way toward preventing police investigators and other similar state actors, such as the respondents in this case, from failing to meet their obligation to produce exculpatory evidence in the future.

It has long been recognized by this Court that police have a "constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel." *Monroe v. Blackburn*, 476 U.S. 1145, 1149 (1986) The Eighth Circuit's conclusion that *Brady* has never been extended to "law enforcement officials other than prosecutors" conflicts with this notion. It also conflicts with this Court's recent decision in *Youngblood*. Therefore, Mr. Clemmons respectfully requests that this Court grant a writ of certiorari so that the Eighth Circuit's opinion can be brought into line with Supreme Court authority.

II. THE EIGHTH CIRCUIT'S DECISION CONSTITUTES A DEPARTURE FROM THE EIGHTH CIRCUIT'S USUAL COURSE OF PROCEEDINGS

In *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001), the Eighth Circuit unequivocally held that a reckless failure by a corrections official to investigate leads offends a defendant's due process rights. *Id.* at 955. The court specifically held that officers conducting a post-arrest investigation have the luxury of unhurried judgments and repeated reflections, which make the recklessness standard appropriate in cases such as the one now before the Court. *Id.* at 957. Accordingly, under *Wilson*, there is no requirement, as respondents would have this Court believe, that a corrections official who fails to

investigate a lead or follow up on material evidence in a murder investigation do so with bad faith or any particular motive in order to be held liable for violating the defendant's rights.

As the Eighth Circuit stated in *Wilson*, "[l]aw enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly as illustrated by the *Brady* line of cases requiring the state to disclose exculpatory evidence to the defense." *Id.* at 957. Under *Wilson*, Mr. Clemmons must only show that Mr. Brooks recklessly failed to carry out this responsibility in order to state a valid *Brady* claim. Holding Mr. Clemmons to a higher standard would be a departure from Eighth Circuit precedent.

In their opposition brief, the respondents complain that Mr. Clemmons "fails to identify what facts were not taken in the light most favorable to him that are properly supported by the record." Opposition at 8-9. It is the totality of the facts pleaded by Mr. Clemmons before the district court and before the Eighth Circuit, and then summarized for this Court, which, when taken in the light most favorable to Mr. Clemmons, can lead to only one conclusion – that the respondents acted recklessly when they failed to investigate leads and suppressed exculpatory evidence in a murder investigation.

In analyzing Mr. Clemmons's claims, the district court identified a few of the facts upon which a reasonable jury could rely in finding that Mr. Brooks acted recklessly in violation of Mr. Clemmons's constitutionally protected rights. It found:

> Plaintiff has come forward with evidence that exculpatory information was forwarded to investigator Brooks, via an IOC from Captain Gross, and that such exculpatory information, once revealed to plaintiff, was sufficient to subsequently acquit plaintiff of the murder charges that defendant Brooks was charged with investigating . . . [T]he court finds that the IOC itself, which specifically states that it is directed to defendant Brooks, is sufficient evidence from which a reasonable jury could infer that defendant Brooks received such IOC. The Court further finds that, based upon such inference, a reasonable jury could further determine that defendant Brooks' failure to investigate the exculpatory information set forth in the IOC, and his failure to forward the IOC to the prosecutor's office as part of the murder investigation file, was the result of reckless or deliberate intent and not that of mere negligence. Additionally, the court notes that evidence of coercion is not required for a failure-to-investigate claim as asserted by defendant.

Brooks App. at 244, Petition Appendix App. 19-20.[1] Mr. Clemmons simply asks that a jury be given an opportunity to review the evidence in this case and make the factual

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[1] In their opposition, the respondents acknowledge that Mr. Clemmons has come forward with evidence that the investigation packet prepared by Mr. Brooks and forwarded to the prosecuting attorney did not contain a copy of the IOC. Opposition at 2-3. But they argue that there is no evidence in the record that the IOC was not given to the prosecutors in subsequent disclosures. Opposition at 10. Once Mr. Clemmons came forward with evidence that the IOC was not produced to the prosecutor, however, the burden to prove that it was produced to the prosecutor shifted to the respondents. The respondents have not come forward with evidence to meet this burden.

determination as to whether Mr. Brooks and the other respondents acted recklessly in violation of his civil rights.

III. THE EIGHTH CIRCUIT'S DECISION CREATES A CONFLICT BETWEEN CIRCUITS

Supreme Court Rule 10 states that the Court may choose to review a case on writ of certiorari if "a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter." In Mr. Clemmons's petition for writ of certiorari, he argues that the Eighth Circuit's decision in *this case* is contrary to the approach used by the Second Circuit in *Williams v. Smith*, 781 F.2d 319 (2d Cir. 1986). It seems that the respondents have misinterpreted this argument, as they have responded by providing a long recitation of the manner in which the Eighth Circuit has addressed the issue of personal involvement in a number of other cases. Opposition at 11-13. The approach used by the Eighth Circuit in the cases cited by the respondents, however, is not at issue here. The issue here is whether the Eighth Circuit, *in this case*, has created a conflict with the well-reasoned approach used by the Second Circuit.

As the respondents acknowledge at Page 12 of their opposition brief, the Second Circuit has specifically stated, "[s]ince personal involvement is a question of fact we are governed by the general rule that summary judgment may be granted only if no issues of material fact exist and the defendant is entitled to judgment as a matter of law." *Williams v. Smith*, 781 F.2d at 323. In their opposition, the respondents argue that Mr. Clemmons has failed to "show sufficient facts to support his claim or that those facts create a causal link to his injury." Opposition at 13.

Mr. Clemmons respectfully disagrees. Mr. Clemmons has put forth numerous facts that could lead a jury to determine that Mr. Gross and Mr. Armontrout recklessly violated Mr. Clemmons rights. These include, but are not limited to, the fact that both Mr. Gross and Mr. Armontrout were aware of Mr. Clark's eyewitness account of the attack on Henry Johnson, the fact that both Mr. Gross and Mr. Armontrout failed to disclose this information to the prosecuting attorney, the fact that Mr. Gross and Mr. Armontrout failed to conduct a meaningful investigation into Mr. Clark's account, and the fact that Mr. Clemmons, when finally able to use Mr. Gross's IOC in his defense, was acquitted of the murder charges for which he served over a decade on death row.

The Second Circuit, in *Williams*, unambiguously stated that the party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. 781 F.2d at 323. While it may be true that the respondents have offered facts to dispute Mr. Clemmons's claim that they were personally involved in causing his rights to be violated, these facts are certainly not undisputed and, accordingly, Mr. Clemmons's case should be heard by a jury.

CONCLUSION

Mr. Clemmons has presented evidence that Mr. Brooks, Mr. Gross, and Mr. Armontrout chose to ignore leads in the investigation of Henry Johnson's murder. They also knowingly concealed material evidence in a capital murder case. As a result of this reckless conduct, Mr. Clemmons spent over a decade on death row. For these

reasons, and for all of the reasons set forth in Mr. Clemmons's petition and in this response, Mr. Clemmons requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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